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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/748,033

12/30/2003

Peter Muhlradt

29473/11899A

7597

4743

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03/21/2008

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EXAMINER

AUDET, MAURY A

ART UNIT

PAPER NUMBER

1654

MAIL DATE

DELIVERY MODE

03/21/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/748,033	Applicant(s) MUHLRADT ET AL.	
	Examiner MAURY AUDET	Art Unit 1654	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 07 February 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
 b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 07 February 2008. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: _____.
 Claim(s) rejected: 1,4 and 6-12.
 Claim(s) withdrawn from consideration: 5.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☐ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: _____.
 12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
 13. ☒ Other: See Continuation Sheet.

/Cecilia Tsang/
 Supervisory Patent Examiner, Art Unit 1654

Continuation of 13. Other: The amendments are entered as they are deemed to place the application in better form for appeal as concerned the 35 USC 112 1st issues surrounding the lack of possession of any fragment or variant of the presently claimed lipopeptide/lipoprotein. However, the remaining rejections under 112 1st written description (as to New Matter after amendment to the alternate stereochemistry), 103, Double Patenting, and 112 2nd are maintained for the reasons of record. Applicant's arguments have been considered but are not found persuasive. The sole issues is what stereochemistry Applicant truly had possession of at the time of filing as to these compounds, written description (e.g. New Matter issue after amendment). As summarized in the last action:

"Response to Arguments

On page 7 of the 2/20/07 response, Applicant states that:

Applicants note that the experimental results reported herein are based on an incorrect interpretation of the stereo configuration of the tested compounds (i.e., the results ascribed to the "R" configuration apply to the "S" configuration and vice versa). Specifically, Example 2 of the present application references a synthetic procedure according to Metzger et al. (1991). Metzger et al. incorrectly indicated that compounds having the "R" configuration are synthesized using (S)-(-)-glycidol as starting material. Instead, compounds having the "R" configuration are synthesized using (R)-(+)-glycidol as starting material. Thus, in view of Metzger, the applicants mistakenly attributed the results for the "R" configuration to the "S" configuration and vice versa. Nonetheless, applicants had possession of the claimed subject matter at the time of the application filing.

Based on the above it is doubtful as to "what is right and what is wrong" and what has been written in the description and what does not. Thus, some form of evidence must be provided to corroborate the above statements, of which, this Examiner is not sure of the form/channel to guide Applicant (Applicant may wish to first consult the MPEP for any guidance). Until such time as the written description for the presently claimed invention is certain, a New Matter rejection is necessitated and the grounds for rejection are maintained based on the reasons of record."

Until the facts surrounding the issue above is properly adjudged all issues presented remain unsettled and thus maintained.